Filed 2/4/19 P. v. Potter CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RONALD EDWARD POTTER, Defendant and Appellant.	E069375 (Super.Ct.No. SWF1707018) OPINION

APPEAL from the Superior Court of Riverside County. W. Charles Morgan, Judge. Affirmed.

Johanna Pirko, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Steve Oetting and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Ronald Edward Potter challenges his conviction for felony intent to evade a police officer with willful and wanton disregard for the safety of

persons and property ("felony reckless evading"), in violation of Vehicle Code section 2800.2. He argues that the prosecutor committed misconduct by mischaracterizing the law in closing argument, because the prosecutor represented that the law states that the jury "should" consider evidence of the defendant's flight in determining his guilt, where the law states that such evidence "may show" defendant's guilt. We find that this argument was forfeited by failing to object at the time so that the court could correct any misstatement. We are not in any event convinced that the prosecutor's statements misstated the law. We therefore affirm.

I. FACTS

This case involves a law enforcement officer's vehicle pursuit of defendant, which ended in a crash. As described below, the prosecution offered facts to establish that the defendant drove recklessly while evading an officer, while the defendant testified that he drove safely while unaware of the officer for much of the pursuit.

A. *Prosecution's Case*

California Highway Patrol Officer Michael Murawski learned of defendant when a Riverside County Sheriff's deputy showed Murawski a photograph of defendant and informed Murawski that defendant had an arrest warrant. He told Murawski, who was assigned to the town of Idyllwild and surrounding areas, that defendant lived in Idyllwild.

A week or two later, Murawski saw a person resembling defendant driving a tan Nissan Quest with expired registration tabs on the rear license plate, but Murawski was on the way to another police matter and did not have time to stop defendant.

On a later date, Murawski saw the same tan Nissan Quest, with nobody inside and with the same expired license plate tab, in a parking lot at the Fairway Market in Idyllwild. He surveilled the van and eventually saw two people leave the market and get into it.

As the vehicle drove past Murawski, he saw that defendant was driving, and he made direct eye contact with defendant. Defendant came to a stop at an intersection and turned left. Murawski made a U-turn to follow behind him and saw defendant rapidly accelerate to about 35 miles per hour. At this point, Murawski activated his patrol vehicle's emergency lights and siren.

As defendant approached a stop sign, he braked abruptly, rolled through the stop sign at approximately 15 miles per hour, and made a left turn onto State Route 243. Route 243 has traffic both ways without a stop sign, and it has posted limits of 25 and 30 miles per hour in the areas near Idyllwild.

At that point, Murawski formed the opinion that defendant was intentionally trying to evade him, and he notified his dispatch center that he was in pursuit of a vehicle not stopping. Murawski followed defendant down State Route 243 at approximately 60 miles per hour, double the speed limit, with emergency lights and siren on.

Defendant approached a downhill, left-hand curve in the road going that speed. As defendant entered the curve, Murawski observed him brake. Defendant left skid marks on the roadway and his tires were smoking. He went off the right side of the road onto a dirt shoulder, colliding with a concrete fence. He hit the fence at what Murawski

roughly estimated to be 30 to 35 miles per hour, creating an impact that set off the air bag.

Defendant's vehicle came to rest against the concrete fence. Murawski saw defendant leave through the driver's side door of the vehicle and take off running toward the open forest. The passenger also ran away and was never identified, as Murawski's focus was on defendant.

Murawski chased defendant on foot. Several times Murawski commanded him to stop, but defendant looked at him in what Murawski viewed as "a panic" and continued to run. After a quarter mile of pursuit, including through some very thick brush and trees, Murawski caught defendant in a residential back yard.

B. *Defendant's Case*

Defendant testified that when he left the Fairway Market, he did not see Murawski nor did he make eye contact with him. He was driving at 15 miles per hour before getting on State Route 243. He did not see Murawski even when turning onto State Route 243, and he went only about 40 miles per hour on that route.

Defendant heard a siren on State Route 243, causing him to look over his right shoulder and see the officer's vehicle approaching fast. Defendant thought the officer was coming due to an emergency, but it did not occur to defendant that the officer might be coming for him. Defendant saw a car stopped in the middle of the highway, which prompted him to hit his brakes, veer off to the side of the road, and wreck his car.

Defendant admitted that at this point he started running. He testified that he did so because ". . . I seen what I had done, and I had a warrant, I took off running. [¶] . . . [¶]

. . . I knew I was going to face up to it so I took off running." That is, he testified that he ran in part to get away from the police officer because defendant knew that he had an arrest warrant. He asserted that he was not trying to evade the police officer while driving, but was only fleeing the officer after the wreck, due to his arrest warrant. After the wreck, defendant ran into the woods, continuing for a quarter mile, even though he could hear the officer commanding him to stop.

C. *Verdict and Judgment*

The jury convicted defendant of felony reckless evading of a police officer. Thereafter, the trial court found true the allegations that defendant previously had been convicted of seven prison prior offenses. (See Pen. Code, § 667.5, subd. (b).) The court sentenced defendant to nine years in prison.

II. DISCUSSION

At trial, defendant's defense to the crime charged, felony reckless evading, turned largely on his claim that he did not intend to evade the officer while he was driving, so he did not commit the crime of reckless evading of an officer with disregard of others' safety. To address this issue, as part of its case, the prosecution argued that defendant's quarter-mile flight on foot from the officer *after* the crash aided in demonstrating that defendant intended to evade the officer while driving before the crash. Because the prosecution advanced this argument, the trial court was required to instruct the jury on flight. (*People v. Williams* (1960) 179 Cal.App.2d 487, 491.) On appeal, defendant does not claim that the instruction, CALCRIM No. 372, was erroneous. Rather, he reasons from the premise that that instruction correctly states the law. Defendant's sole argument

on appeal is that the prosecutor committed misconduct in his closing argument by mischaracterizing the law contained in that jury instruction.

A. *Defendant's Contention that the Prosecutor Misstated the Law*

The court's jury instruction, CALCRIM No. 372, instructed the jury that evidence of defendant's flight "may show" his guilt:

"If the defendant fled or tried to flee immediately after the crime was committed, that conduct *may show* that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself." (Italics added.)

Defendant argues that the prosecutor contradicted this instruction in closing argument by using the word "should" instead of "may" on four occasions. The four phrases defendant identifies are identified by the numbers in brackets below and placed in italics:

"If a person flees immediately after committing a crime, [1] *you should use that in consideration of his guilt*. Look at what the defendant did. Even after crashing his car into a fence . . . He didn't sit there, wait for the police officer to come tell him what happened. He ran. And [2] *the law says you should use that in considering his guilt* because he ran away because he knew what he did was wrong . . . . [¶] . . . [¶]

"One of the first things they told you to ignore is the fact that he fled the scene immediately after crashing because they want you to ignore that fact. They know that is the worst fact possible to show what his intent was when he was driving that vehicle.

That's why they asked you to ignore it. That's not important. That's not relevant. [¶] . . . The law says the exact opposite of that. The law says that flight after someone commits a crime is evidence of their guilt. [3] *The law says you should consider that.* I'm telling you, [4] *you should consider that as well* because that shows what he was thinking. Actions speak louder than words." (Italics added.)

The first and fourth statements are not even arguably misstatements of the law. They plainly are the prosecutor's *argument* that the jury should consider the evidence of flight, an argument that is entirely permissible under any view of the law.

Thus, we need consider only the second and third statements, where the prosecutor represented what the law stated. He said: "the law says you should use [flight] in considering his guilt" and "The law says you should consider that [defendant ran]." According to the law in the jury instruction, flight "*may show* that [defendant] was aware of [his] guilt."[1] (CALCRIM No. 372, italics added.) Defendant's argument requires us to find that the prosecutor's use of the word "should" instead of "may" conflicts with the jury instruction.

---

[1] The application of CALCRIM No. 372 here differs from that in most cases. In the typical case where CALCRIM No. 372 is used, a defendant has committed a crime (say, an act of vandalism) and flight upon the arrival of an officer may help demonstrate that the defendant is guilty of that crime because the reason for the flight is that defendant knew he is guilty. Here, the prosecution argued that the defendant's intent to evade during his flight on foot demonstrated that he had the intent to evade during his earlier driving with the officer in pursuit, not that defendant fled because he knew he was guilty of reckless evading.

B. *Defendant Forfeited His Contention by Not Objecting at Trial*

By not objecting to the alleged misstatements at trial when they could have been corrected with an instruction from the court, defendant has forfeited his appellate claim.

"As a general rule, '"[a] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety."' [Citation] The defendant's failure to object will be excused if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct." (*People v. Centeno* (2014) 60 Cal.4th 659, 674.) "A prosecutor's misstatements of law are generally curable by an admonition from the court." (*Ibid*.)

We have no reason to conclude that an objection would have been futile. A simple statement from the court directing the jury's attention to the terms of CALCRIM No. 372 would have cured any harm that might have resulted from any misstatement. The issue is forfeited on appeal here.

C. *In Any Event, There Was No Error*

Although defendant lost the ability to challenge on appeal the prosecutor's statements by not objecting to them, we are not persuaded that the prosecutor even misstated the law. CALCRIM No. 372 authorizes the jury to consider evidence of flight by stating that such evidence "may show" consciousness of guilt. "[T]he instruction merely permit[s] the jury to consider evidence of flight in deciding defendant's guilt or

innocence; it d[oes] not suggest that the jury should consider such evidence as dispositive." (*People v. Carter* (2005) 36 Cal.4th 1114, 1182.)

Because the law permits the evidence of flight to be considered as evidence of guilt, it is not a misstatement for a prosecutor to represent that the law says that a jury "should use [flight] in considering" guilt. Nor is it improper for a prosecutor to represent that the law states that the jury "should consider [that defendant ran]." In both instances, the prosecutor has told the jury that the law states that it should *consider* flight evidence that the law deems admissible and potentially relevant. All evidence properly admitted at trial must at least be *considered* by the jury. (See CALCRIM No. 220 ["you must impartially compare and *consider all the evidence* that was received throughout the entire trial"; italics added].) The prosecutor's argument did not represent that the law does more than require that much. The prosecution did not, for example, improperly suggest that the law views the flight evidence as dispositive, or that the law provides any sort of substantive presumption due to that evidence.

As far as the law is concerned, the jury should consider (if not *must* consider) the flight evidence—just as it should consider any other admissible evidence—though the parties may disagree on what that evidence shows. While the prosecutor obviously wanted the jury to both consider the flight evidence *and* conclude that it in fact supported a finding of guilt, this was fair advocacy, rather than a misstatement of law. A defendant's attorney could properly respond to the prosecutor's argument by agreeing that the jury should *consider* the fact that the defendant fled on foot, but then explaining why that consideration should not lead to a determination that the defendant is guilty of

reckless evading of the officer while driving. In such a dispute, both attorneys would be advocating different positions without misstating the law. This is what closing argument is for.

Because we conclude there was no prosecutorial error, we need not further address defendant's claim that his trial counsel was ineffective by failing to object to the prosecutor's "should" statements. Counsel did not err because the statements did not misstate the law. We also need not further address defendant's claim that the prosecution's "should" statements caused the guilty verdict, because in an earlier trial in this case that ended in a hung jury, the prosecutor did not use the same closing argument language. Because the statements were not erroneous, it does not matter if they were effective advocacy. We note in any event that it would be speculative to conclude that the statements were the key to the prosecution's success. In the respondent's brief, the People point out several differences in the evidence between the two trials.

III. DISPOSITION

The judgment of conviction is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAPHAEL
J.

We concur:

RAMIREZ
P. J.

MCKINSTER
J.